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U.S. COURT OF APPEALS

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANTHONY TREVINO, Petitioner - Appellant, v. **K. W. PRUNTY, Warden**, Respondent - Appellee.	No. 04-56287 D.C. No. CV-94-01913-IEG **MEMORANDUM**[*]

Appeal from the United States District Court
for the Southern District of California
Irma E. Gonzalez, District Judge, Presiding

Argued and Submitted July 13, 2005
Pasadena, California

Before: **REINHARDT**, **KOZINSKI** and **BERZON**, Circuit Judges.

Petitioner properly moved to withdraw his unexhausted claim from his pro se federal habeas petition, see Szeto v. Rushen, 709 F.2d 1340, 1341 (9th Cir. 1983), but the magistrate judge never acted on the motion, or even acknowledged

[*] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

it. Instead, the district court dismissed his petition as mixed. Petitioner then secured counsel and moved for reconsideration, but the district court denied relief and instructed him that "[d]ocuments filed by petitioner since the closing date will be disregarded and no orders will issue in response to future filings." Petitioner reasonably believed that this order barred him from filing a notice of appeal or a fully-exhausted amended petition.

Despite efforts by petitioner's family to spur counsel to action, counsel allowed the AEDPA statute of limitations period to run, frittered away five years without taking any action on petitioner's behalf and withdrew as petitioner's attorney. Petitioner then secured a second attorney, who did nothing for approximately two additional years.

The district court's failure to respond to petitioner's filings, its misleading command not to file any additional pleadings, the incompetence of petitioner's first attorney and the inaction of petitioner's second attorney constitute "extraordinary circumstances" sufficient to justify Fed. R. Civ. P. Rule 60(b)(6) relief. See Community Dental Servs. v. Tani, 282 F.3d 1164, 1168 (9th Cir. 2002). Petitioner's motion to amend his original petition should have been granted. On remand, his amended petition should be considered on the merits.

REVERSED AND REMANDED.